

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OSCAR MONTES,

Defendant-Appellant.

UNPUBLISHED

March 22, 2002

No. 223539

Wayne Circuit Court

LC No. 99-004118

Before: Saad, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from a jury trial conviction for kidnapping, MCL 750.349. The trial court sentenced defendant to thirty to sixty years in prison, and we affirm.

I. Facts and Procedural History

On April 13, 1999, the four-year old victim and her nine-year-old sister walked from their home in Detroit to the corner store, approximately three houses away. As the girls entered the store, the victim's sister saw defendant turn his truck around on McGraw Street and drive toward the store. As the girls walked out of the store, defendant approached the girls on foot and offered the victim some chewing gum. Defendant then grabbed the victim's sister, who kicked and fought until she escaped defendant's grip. However, defendant was able to grab the victim and put her into the front seat of the truck, through the driver's side door. Defendant then entered the truck and sped away as the victim stood up and began scratching and hitting the back window of the truck.

Ramon and Esther Hernandez were driving past the store as the incident occurred and saw defendant grab the victim and put her in his truck. They followed defendant's truck as he tried to drive towards the freeway, and were able to pursue him as he then drove at high speeds through a red light at Michigan Avenue and toward a truck yard on John Kronk Street. Esther Hernandez testified that the victim was screaming and crying inside the truck. During the pursuit, the Hernandez' saw a police car and Ramon Hernandez beeped his car horn and Esther Hernandez began screaming to get the officer's attention. Esther Hernandez told the officer that that the driver of the truck in front of them had kidnapped a young girl. The officer pulled up beside the truck and saw the victim crying through the passenger window. At first, defendant ignored the officer's flashers and gestures to pull over. However, defendant eventually pulled into a gas station and, thereafter, was placed under arrest. When police searched defendant, they

noticed that the zipper of his pants was open and that he was carrying candy, gum, and climax control lotion. Defendant testified that he picked up the victim merely to help her find her mother.

Defendant was charged with one count of kidnapping. After the close of proofs, the trial court instructed the jury that it could find defendant guilty under the “forcible confinement” theory or the “secret confinement” theory of kidnapping. The jury convicted defendant of one count of kidnapping, and did not specify under which theory it found him guilty.

While defendant does not dispute that sufficient evidence supported his kidnapping conviction under the forcible confinement theory, he contends that the evidence did not support a conviction under the secret confinement theory. Therefore, he argues, his conviction must be reversed because he was denied his constitutional right to a unanimous verdict because one of the prosecutor’s two alternate theories was not supported by sufficient evidence.

We hold that, under the totality of the circumstances in this case, sufficient evidence supported defendant’s conviction under both the secret confinement and forcible confinement theories of kidnapping.

“In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). The Michigan kidnapping statute, MCL 750.349, provides, in pertinent part:

Any person who wilfully, maliciously and without lawful authority shall forcibly or secretly confine or imprison any other person within this state against his will, or shall forcibly carry or send such person out of this state, or shall forcibly seize or confine, or shall inveigle or kidnap any other person with intent to extort money or other valuable thing thereby or with intent either to cause such person to be secretly confined or imprisoned in this state against his will, or in any way held to service against his will, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.

The statute “contains two separate descriptions of punishable conduct: forcible confinement or imprisonment and secret confinement or imprisonment.” *People v Wesley*, 421 Mich 375, 384; 365 NW2d 692 (1984). It is well settled that “a kidnapping conviction may be premised on a showing of confinement that in fact is secret or upon a showing of forcible seizure or confinement with intent to secretly confine, whether or not the confinement remains a secret.” *Jaffray, supra* at 300-301, citing *Wesley, supra*. “[M]ere awareness by a third party of the victim’s plight is not dispositive” in determining whether secret confinement kidnapping occurred. *Jaffray, supra* at 306. Indeed, “[i]n some situations, other factors must be taken into account in determining whether the conduct of an accused constitutes secret confinement kidnapping.” *Id.* The *Jaffray* Court quoted with approval from this Court’s opinion in *People v Lucille Walker*, 135 Mich App 311, 325-326; 355 NW2d 385 (1984):

“Secret confinement, within the meaning of § 559.240, does not require proof of total concealment and complete isolation whereby the victim is rendered invisible

to the entire world. It is sufficient to show that the person kidnapped has been effectively confined against his will in such a manner that he is prevented from communicating his situation to others and accused's intention to keep the victim's predicament secret is made manifest." [*Lucille Walker, supra* at 325-326, quoting *State v Weir*, 506 SW2d 437, 440 (Mo, 1974).]

The *Jaffray* Court further explained:

[A] proper focus is on the channels of communication available to the victim. Although a third person may have suspicions or even knowledge concerning a confinement, unless he is aware of the specific location of the victim, the victim may be deprived of the ability to communicate his plight to others. In other words, absolute, prolonged secrecy is not always required to sustain the charge; it is enough that secrecy, or the attempt to maintain secrecy, denied the victim the opportunity to avail himself of outside help.

* * *

As we read Michigan's kidnapping statute in light of the authorities, we conclude that the essence of "secret confinement" as contemplated by the statute is deprivation of the assistance of others by virtue of the victim's inability to communicate his predicament. "Secret confinement" is not predicated solely on the existence or nonexistence of a single factor. Rather, consideration of the totality of the circumstances is required when determining whether the confinement itself or the location of confinement was secret, thereby depriving the victim of the assistance of others. That others may be suspicious or aware of the confinement is relevant to the determination, but is not always dispositive. [*Jaffray, supra* at 307, 309 (footnote omitted).]

Under the totality of the circumstances, viewed in the light most favorable to the prosecution, a rational trier of fact could have found, beyond a reasonable doubt, that secret confinement occurred. While it was fortuitous that Ramon and Esther Hernandez witnessed the victim's initial abduction and followed the truck, their knowledge of the victim's confinement is not dispositive. *Jaffray, supra* at 309. Defendant clearly placed the victim in a position in which she was unable to leave, she was deprived of the assistance of others and was unable to communicate her predicament. While the victim may have appeared visibly upset, she obviously lacked any means to effectively communicate her plight to the outside world; quite simply, a crying four-year-old in a moving truck would not alert a passerby to her need of immediate help or that she had been abducted. Indeed, the truck apparently drove past a police car and the officer did not notice the victim or her predicament until Ramon and Esther Hernandez told him that the driver had kidnapped a child. In sum, under circumstances involving a child of tender age placed inside a truck traveling at high speeds away from the point of abduction, a reasonable jury could clearly find that secret confinement occurred.

Furthermore, "it is well settled that when a statute lists alternative means of committing an offense, which means in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theories." *People v Gadomski*, 232 Mich App 24, 31; 592 NW2d 75 (1998). Moreover, it is not error for the trial court to give the

jury an instruction that it may convict the defendant of the charge under alternative theories. *Id.* at 31-32. This case presents a single act of kidnapping and the various theories listed in MCL 750.349 constitute alternative means of proving a single offense and would not support convictions of separate and distinct kidnapping offenses. *People v Bergevin*, 406 Mich 307, 312; 279 NW2d 528 (1979). Accordingly, and because the prosecutor presented sufficient evidence to support defendant's conviction under both theories of kidnapping, defendant's argument regarding the lack of jury unanimity is without merit.¹

Defendant further avers that the trial court erred because his sentence was disproportionately severe, the upward departure from the guidelines was based on reasons already included in the guidelines, and the trial court relied on inaccurate information at sentencing.

"We review for an abuse of discretion the trial court's decision that objective and verifiable factors constitute substantial and compelling reasons for departing from the guidelines' recommended minimum sentence." *People v Armstrong*, 247 Mich App 423, 424; 636 NW2d 785 (2001). Further

The court may depart from the guidelines if it "has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). The court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines or where factors considered by the guidelines have been given inadequate or disproportionate weight. MCL 769.34(3)(a), (b). [*Id.* at 425.]

The trial court clearly did not abuse its discretion in finding substantial and compelling reasons for departing upward from the guidelines.

Defendant committed the kidnapping on April 13, 1999, and the trial court used the legislative sentencing guidelines, enacted pursuant to MCL 769.34, to determine the recommended range of defendant's minimum sentence. The sentencing guidelines provided for a minimum sentence range of 81 to 135 months in prison and the trial court sentenced defendant to thirty to sixty years in prison (360 to 720 months). The trial court based its upward departure on several factors, including the victim's young age. While the exploitation of a victim's age is contemplated in the guidelines, MCL 77.40(1)(b), the trial court correctly concluded that the guidelines do not adequately consider the circumstances at issue here, where defendant not only took advantage of the four-year-old by luring her to his truck with chewing gum, but also physically overpowered her in order to force her into his truck.

¹ Defendant also claims instructional error on the issue of consent. As the prosecutor correctly observes, defendant waived this issue by expressly agreeing with the jury instructions as given by the trial court. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000). A defense attorney's express approval of jury instructions, as opposed to his mere failure to object, constitutes a waiver that extinguishes any error. *Id.* at 216; see also *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

The trial court also found substantial and compelling reasons to depart upward from the guidelines because of defendant's young age, particularly in light of his substantial criminal history. Age is an appropriate factor to consider in evaluating whether to depart from the guidelines. *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995). Further, while the trial court also pointed to the victim's severe psychological trauma, which may already have been contemplated by the guidelines, MCL 777.34, based on the trial court's other reasons, we cannot conclude that the trial court abused its discretion in its upward departure.

In sum, the guidelines simply do not reflect the substantial and compelling factors in this case which make defendant's actions particularly loathsome. Defendant, a twenty-five year old young man with five prior felony convictions pulled up to two small girls, took advantage of the victim's innocence and physical vulnerability by offering her candy and then violently wrenched her from her sister's hand, forced her into his truck and drove away at high speeds. Defendant's sentence was proportionate and the upward departure from the guidelines range was more than justified by the circumstances in this case and no abuse of discretion occurred.

Affirmed.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Peter D. O'Connell